No. 21272

United States
Court of Appeals
for the Ninth Circuit

VELJKO STANISIC,

Appellant,

vs.

U.S. IMMIGRATION & NATURALIZATION SERVICE, and ALFRED J. URBANO, District Director, United States Immigration and Naturalization Service

Appellees.

On Appeal from the judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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INDEX

INDEX OF CITATIONS

Cases:

STATUTES AND REGULATIONS INVOLVED

TEXTS

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COUNTER-STATEMENT OF THE CASE

The facts, as found by the Honorable William G. East in his Opinion below, may be briefly summarized as follows: Appellant Stanisic (Stanisic), a national of Yugoslavia, was a member of the crew of the M-V SUMADIJA, of Yugoslavian registry, on January 4, 1965 (R.86)[1]

During the night of January 4, 1965, while the M-V SUMADIJA was in the port of Coos Bay, Ore-

[1] Record references are to the two volume District Court Clerk's Transcript of Record

gon, Stanisic, who held an entry permit as a visiting seaman issued by the Appellee Naturalization Service, departed the ship, with the intention of remaining in the United States (R. 87).

Appellee Alfred J. Urbano (Urbano), District Director of Immigration and Naturalization Service in Oregon, when advised of the desertion, revoked Stanisic's entry permit. 8 U.S.C. § 1282(b) (R.87).

On January 7, 1965, Stanisic sought of Urbano parole to the United States pursuant to the provisions of 8 U.S.C. § 1253(h) on the grounds that he was non-sympathetic to the averred Communist government of Yugoslavia, and should he return to Yugoslavia he would be subjected to physical persecution for his political beliefs (R. 87).

Urbano on January 7, 1965 caused Stanisic to be interrogated by personnel of his Portland office, and, based upon the record of such interrogation, found in the exercise of his discretion that Stanisic's grounds for parole were wanting, denied his application for parole and ordered him excluded and returned to his ship (R. 44-45, 87).

Stanisic then instituted a proceeding in the District Court seeking injunctive relief from Urbano's orders. Stanisic claimed that he had sufficient entry status to entitle him to a hearing before a special

inquiry officer, prescribed for regular deportation proceedings under 8 U.S.C. § 1252(b) (R. 41-48, 87). The District Court, while holding that Stanisic had no such right to a hearing before a special inquiry officer (R. 87-89), stayed the contemplated exclusion order and referred the matter back to Urbano for the purpose of holding an evidentiary hearing to receive such testimony and evidence which Stanisic desired to produce in support of his claim of physical persecution if returned to Yugoslavia (R. 89). On January 19 and 20, 1965, Urbano caused the evidentiary hearing to be held by William L. Pattillo (Pattillo), Deputy District Director for Oregon, and Stanisic called and interrogated all witnesses and produced all evidence of his choice (R. 89).[2]

Based upon the record of such hearing, Urbano, on January 25, 1965, in the exercise of his discretion, found that: (R.89)[3]

(a) The petitioner, upon his return to Yugoslavia, would probably be subjected to penalties provided by law for his voluntary desertion of his ship, and

(b) The petitioner had failed to prove his claim

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[2] The record of these hearings are contained in a 62-page document which is part of the record on appeal.

[3] Urbano's findings are contained in a ten page document which is in the supplemental record on appeal (pp. 101-110).

> of physical persecution for his political beliefs upon his return to Yugoslavia,

and accordingly denied the petition for parole. On January 27, 1965, Stanisic moved the District Court to review Urbano's decision and order of January 25, 1965, on the ground that the same was arbitrary, capricious, was not supported by the evidence, and that Urbano was biased against him (R. 50-52, 89).

Stanisic noticed the discovery depositions of Urbano and Patillo, and the Court denied Urbano's and Pattillo's request for relief from such discovery (R. 89). These depositions were taken on May 18, 1964, and the depositions, as well as the complete administrative files of the Immigration Service's Oregon office relating to Stanisic, were filed for review by the District Court *in camera* (R. 89-90). [4] Upon the basis of this record, and the record of the evidentiary hearing before Pattillo, Stanisic and Urbano each filed Motions for Summary Judgment in their respective favor (R. 89).

The District Court, after holding that it had jurisdiction to review the proceedings before Urbano (R. 90-93), denied Stanisic's claim for injunctive relief and granted the government's Motion for Summary Judgment as follows: (R. 93-96)

"I have reviewed the entire record as devel-

[4] The depositions of Urbano and Pattillo are contained in the record on appeal.

oped and placed before Urbano upon the petitioners' claim for physical persecution for political belief if returned to Yugoslavia, and conclude that Urbano did not abuse his discretion in denying the applications for parole, nor are his findings and order lacking a foundation. Evidence substantiating the petitioners' claim of physical persecution for their political beliefs is conspicuous by its complete absence.

"The petitioners make no claim that Urbano's decision and order is illegal.

"I find the entire record before Urbano and this Court devoid of any evidence whatsoever that Urbano acted fraudulently, arbitrarily, or capriciously in his evaluation of the evidence before him.

"The petitioners have claimed Urbano was personally biased in denying their parole and that he should have been disqualified. The asserted bias is based in large part upon alleged facts known prior to the hearing. Under § 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1006(a) (1964 ed.) disposition of allegations of bias is initially the agency's responsibility. The allegations are to be raised by 'the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification,' and 'the *agency* shall determine the matter as a part of the record and decision in the case.' (Emphasis supplied.) However, the petitioners raised the issue of personal bias for the first time in these proceedings following the evidentiary hearing, and under the provisions of § 1006(a), as usually applied, lost their opportunity to assert the question of bias. Davis, *Administrative Law Text* § 12.06 (1958). 'The issue of bias must be raised neither too soon nor too late.' *Ibid.* Nevertheless, the Court has examined the rec-

ord before it and finds the claims of bias groundless.

"The evidentiary record discloses that each of these petitioners enjoyed a good civilian and governmental status in his country at the time he departed on the voyage ultimately bringing him to the United States, in spite of his now-avowed anti-Communistic political beliefs.

"What 'physical persecution,' if any, they will receive upon their return to their own country, will be due to their voluntary desertion of their ship and other voluntary acts and averments occurring since.

"These causes have aroused a great deal of public sympathy for the petitioners, all without full advice as to the facts and circumstances. Granted, the petitioners may be anti-Communistic in their political beliefs, and in all probability would be good citizens of the United States; nevertheless, Congress has not seen fit to provide for lawful entry or permanent refuge in the United States (other than by established quotas for citizens of nations with Communistic Governments) on the sole ground that those individuals are not sympathetic with that Communistic Government. Neither Urbano nor this Court can make such legislation."[5]

No appeal was taken by Stanisic from this Order of the District Court.

Shortly thereafter, Stanisic's expulsion from the United States was stayed pending his application to

[5] References by Judge East to the "petitioners" (plural) include aside from Stanisic, one Veselin Vucinic, a Yugoslavian national who jumped ship with Stanisic, and who also applied for parole to this country.

Congress for a private bill to permit him to remain in this country (R. 14). The Senate Judiciary Committee did not approve the bill, and the matter was referred back to Urbano in June 1966 for appropriate action (R. 14). On June 21, 1966, Urbano ordered Stanisic to appear on June 24, 1966, for deportation to Yugoslavia (R. 14). Stanisic then filed a Petition for Parole (R. 34-35) on June 22, 1966, requesting:

(1) A stay of deportation to Yugoslavia on the basis of anticipated persecution on account of religious and political opinion, and on account of pending litigation in an assault and battery case in Lane County, Oregon, in which Stanisic was the plaintiff;

(2) A hearing before a special inquiry officer of the Immigration Service; and

(3) In the alternative in the event of the denial of the petition thereafter to depart voluntarily from the United States at his own expense.

The petition alleged that Stanisic was entitled to such relief on the ground that Congress, on October 3, 1965, (some three months after Judge East's decision and order) amended 8 U.S.C. § 1253(h) so as no longer to require solely physical persecution as a ground for asylum, but to allow in lieu thereof "persecution on account of race, religion, or political opinion". (R. 34)

This petition was denied by Urbano on June 23, 1966 (R. 32-33). On that same day, Stanisic filed in the United States District Court a Complaint (R. 1-3) seeking an order restraining deportation and further relief under 8 U.S.C. § 1253(h) on the ground of persecution on account of religious and political opinion. The government opposed the request for relief (R. 9-10), and on June 24, 1966, the Honorable John F. Kilkenny entered Findings and Judgment in favor of the government as follows: (R. 20)

> "The above cause having come on before the Court upon the petitioner's Motion to Restrain and petitioner appearing by G. Bernhard Fedde and the respondents appearing by Sidney I. Lezak, United States Attorney, and the Court having considered the record in Civil 65-10 in this Court between the same parties and the opinion of the Honorable William G. East filed in that case and arguments having been made, and
>
> "It appearing from the entire record that there was substantial evidence in support of the findings and order of respondents, and being now fully advised,
>
> "IT IS ORDERED, ADJUDGED and DECREED that petitioner's motion to restrain be, and the same is hereby, denied."

The present appeal is from the Order of Judge Kilkenny denying injunctive relief.

ARGUMENT

Appellant's brief presents two major arguments: (1) That he is entitled to a full scale hearing before a special inquiry officer under Section 242(b) of the Immigration and Naturalization Act, 8 U.S.C. 1252(b), and (2) that he qualifies under the 1965 amendment to Section 243(h) of the Act, U.S.C. 1253(h), which permits a stay of deportation to an alien within the United States who—in the opinion of the Attorney General—would be subject to persecution on account of race, religion or political opinion. As was shown in the statement above and as discussed below, these issues were decided against appellant by Judge East in the first civil injunctive action instituted by him, and since no appeal was taken, the matter is clearly *res judicata* in the present proceeding. However, since appellant's brief—in our view—so fundamentally misconceives the provisions of the Immigration and Naturalization Act of 1952, we believe it may be helpful to the Court by way of background to set forth the statutory scheme and the Congressional purpose in enacting the alien crewmen laws and to show that these procedures were properly followed in this case.

The procedure followed herein by the Immigration and Naturalization Service was proper and fully complied with the Immigration and Nationality Act of 1952 and the amendments thereto.

A. THE STATUTORY SCHEME

The central considerations raised by appellant's argument are whether the different treatment accorded alien crewmen on foreign vessels touching at United States seaports as distinguished from other aliens is in accordance with the provisions of the Immigration and Naturalization Act of 1952. Resolution of this issue depends on an analysis of the relevant statutory provisions and the Congressional purpose in enacting them. As we shall show, Congress has determined that the alien crewman presents a special problem which makes separate classification and special and summary treatment rational and not arbitrary as appellant charges in his brief.

Congress in enacting the Immigration and Nationality Act in 1952 recognized that one of the most serious abuses to be corrected in the enforcement of immigration laws concerned the alien who as a crewman was arriving in this country, intending to desert or to otherwise enter illegally. Report of the Committee on the Judiciary, 81st Congress, 2d Session, April 20, 1950, Report No. 1515, "The Immigration and Naturalization Systems of the United

States" included these remarks regarding seamen: (pp. 54-58):

"c. *Comment on practices and problems relating to alien seamen*

"(1) *Statement of the problems*

"The problems relating to seamen are largely created by those who desert their ships, remain here illegally beyond the time granted them to stay, and become lost in the general populace of the country. For a number of years, it has been generally recognized, both by Government officials and others, that the temporary 'shore leave' admission of alien seamen who remain illegally constitutes one of the most important loopholes in our whole system of restriction and control of the entry of aliens into the United States. The efforts to apprehend these alien seamen for deportation are encumbered by many technicalities invoked in behalf of the alien seamen and create conditions incident to enforcement of the laws which have troubled the authorities for many years . . .

"The complexity of the problem was described by an official of the Visa Division of the Department of State as follows:

'Seamen constitute one of our biggest problems we have today. If we could ever devise some way to control the movement of hundreds and thousands of seamen in and out of our ports every year and yet preserve to a maximum degree the national security of this country, I think we would have accomplished a great task. But you cannot do it—at least no way has so far been found—without seriously delaying shipping. You cannot hold up a vessel and go into the history and background of every person who happens to be signed on the crew list of the ves-

> sel as a seaman. Some inspections must be made of those people but you cannot hold up shipping.'"

With this in mind, Congress in 1952 enacted a group of special provisions for crewmen to provide greater controls over them, and also to provide for the revocation of their permits and their speedy removal from the United States if, after being given shore leave, they were found to be not intending to depart with the vessel on which they arrived. These and other provisions relating solely to crewmen are contained in Chapter 6, Immigration and Nationality Act, which is entitled "Special Provisions Relating to Alien Crewmen" (Sections 251-260, Immigration and Nationality Act, 8 U.S.C. 1281-87). In enacting these laws, Congress had this to say: (United States Code, Congressional and Administrative News, Volume 2, 82nd Congress, 2nd Session, 1952, pp. 17, 21-22):

> "8. *ALIEN CREWMEN CONTROLS (Ch. 6)*
>
> "Chapter 6 of the bill brings together in one grouping the various provisions of existing law which impose special controls on the entry and departure of alien members of the crews of vessels and aircraft. Generally, the controls under existing law are brought forward with modifications which will insure that members of the crews of vessels or aircraft entering the ports or airports of the United States from foreign places will depart the United States, while at the same time permitting the crew members to land temporarily for such periods of time as is necessary to maintain normal operations in the con-

duct of foreign commerce. Where appropriate, the provisions are made applicable to crew members of aircraft on the same basis as they are applied to seamen.

"One significant change is that statutory provision is made for the granting of conditional permits to land temporarily similar to the present authorization provided by regulations. Section 252 provides that otherwise admissible alien crewmen may, in the discretion of an immigration officer and if the crewman agrees to accept the conditional permit, be permitted conditionally to land temporarily for not more than 29 days, which permission is revocable if the alien is found not to be a bona fide crewman or does not intend to depart on the vessel on which he arrived or some other vessel. Upon the revocation of such a conditional permit, an immigration officer is authorized to take the crewman into custody and require the master or commanding officer of the vessel or aircraft on which the crewman arrived, to detain such crewman on board, if practicable, and any expense involved in the deportation of the crewman from the United States shall be at the expense of the vessel or aircraft on which he arrived. The procedure set forth in section 242 of the bill is not applicable in the case of the removal of a crewman whose conditional permit to land temporarily has been revoked . . . "

To the same effect, see "Commentary on the Immigration and Nationality Act" by Walter M. Besterman, Legislative Assistant, Committee on the Judiciary, House of Representatives, 8 U.S.C.A. page 39.

The laws that apply generally to aliens may also apply to an alien crewman. However, Congress has consistently followed a policy that most laws that afford relief to aliens generally will not be available to alien crewmen.

First of all, Congress vested discretionary authority in immigration officers in permitting alien crewmen to land temporarily during the time their vessel is in port, for a period not to exceed 29 days. During this period, if the immigration officer determines that the crewman is not bona fide or does not intend to depart on his vessel, his conditional permit to land may be revoked. If revoked, the crewman is to be taken into custody and the master of the vessel is required to receive and detain him for deportation from the United States (Section 252(b), Immigration and Nationality Act.) In such a case, Congress has specifically provided that "*Such alien is not to be given a deportation hearing under the procedures prescribed in Section* 242" Immigration and Nationality Act (8 U.S.C. 1252), before a special inquiry officer, with an appeal to the Board of Immigration Appeals. [6] A warrant of arrest required by Section 242 when an alien is

[6] The constitutionality of Section 252(b), 8 U.S.C. 1282(b), was upheld in *Savelis* v. *Vlachos,* 137 F.Supp. 389, 395-396 (E.D. Va.), affirmed 248 F.2d 729 (C.A.4)

taken into custody pending determination of deportability is not required. (8 C.F.R. 252.2). The proceeding is summary and swift.

This proceeding is to be distinguished from the proceedings afforded to an alien *other than a crewman* who is granted shore leave, and who then deserts his ship or otherwise over-stays the time for which he was permitted to land. When such an alien is apprehended, he comes within the prescription of Section 242 (8 U.S.C. § 1252). When an alien is entitled to such a proceeding, he is to be given notice of charges, full opportunity to present evidence, right to cross-examine witnesses, etc., and in addition he may appeal to the Board of Immigration Appeals (8 C.F.R. 3.1). He may apply to the special inquiry officer during the deportation proceeding for statutory remedies to which he is eligible. (8 C.F.R. 242.17).

In sum, the alien crewman, such as appellant, whose landing permit has been revoked pursuant to Section 252(b) does not have a right to a deportation hearing: the revocation is accomplished as a matter of discretion. No notice of charges is given and no formal hearing before a special inquiry officer is required, although—as shown in the statement above—appellant was given the virtual equivalent of such a hearing in this case.

The case law in this area is in accord with the Government's position herein and the decision of Judge East below (R. 88). In *Glavic* v. *Beechie,* 225 F. Supp. 24 (S.D. Texas), affirmed 340 F.2d 91 (C.A. 5), the Fifth Circuit in a *per curiam* opinion squarely held that an alien Yugoslavian crewman whose conditional landing permit had been revoked after he made known to the Immigration Service that he no longer intended to depart this country on his vessel was not entitled to a hearing under the general deportation provisions (8 U.S.C. 1252-1254) before a special inquiry officer on his claim of alleged persecution if returned to Yugoslavia. See also *United States ex rel. Stellas* v. *Esperdy,* 366 F.2d 266, (C.A.) 2) petition for certiorari pending; *United States ex rel. Lam Hai Cheung* v. *Esperdy,* 345 F. 2d 989, 990 (C.A. 2). The Court further held, as did Judge East below, that the alien was entitled to be heard (as here) on his claim of alleged persecution under Regulation 8 C.F.R. 253.1(e) which provides pursuant to 8 U.S.C. § 1182(d) (5) for parole into the United States of an alien crewman "who alleges that he cannot return to a Communist country because of fear of persecution in that country on account of race, religion or political opinion." 8 C.F.R. 253.1(e).

In its careful and lucid opinion in the *Glavic* case the District Court distinguished the case of *Szlajamer* v. *Esperdy,* 188 F.Supp 491 (S.D.N.Y.), cited

by appellant in his brief (BR. 10), as follows: (255 F.Supp. 24)

> "The unusual element which complicates this case is that plaintiff, alleging that he would be subjected to persecution if returned to Yugoslavia, requested that he not be returned to his ship. A very similar situation occurred in United States ex rel. Szlajamer v. Esperdy, 188 F. Supp. 491 (S.D.N.Y. 1960). At the time that case was decided there was no regulation providing an opportunity for relief to an alien crewman claiming that he would be persecuted if returned to his ship and thence to his homeland. The federal district court under those circumstances held that the seaman was entitled to be heard on his claim under 8 U.S.C.A. § 1253(h), the general provision under which this plaintiff desires to be heard, notwithstanding the statutory proviso that 8 U.S.C.A. § 1252 procedures were inapplicable to alien crewmen. That decision was not appealed, and whether its analysis of the statute under those conditions was correct or not, its correctness certainly appears questionable under present conditions and in light of the recent decision of the Supreme Court in Foti, supra, in which it was held that a statutory reference to 8 U.S.C.A. § 1252(b) included by implication the closely related sections 1253 and 1254, requiring direct appeal to the courts of appeal on final orders of denial of suspension of deportation under those sections.
>
> "As a result of the Szlajamer case, the Attorney General promulgated the regulation, 8 C.F.R. 253.1(e), which provides an opportunity under 8 U.S.C.A. 1182(d)(5) for an alien crewman to obtain parole into the United States if he faces persecution in a Communist or Communist-dominated country. The application of

> that regulation in the present case appears to coincide with the statutory framework, and to be much more in keeping with the congressional intent as applied to alien crewmen than Szlajmer. Therefore, the Court is of the opinion that a hearing before a special inquiry officer under 8 U.S.C.A. § 1253(h) is not required by the Act in this case."

Given this statutory background and the decisional law interpreting it, we submit that Judge East was correct in holding appellant was not entitled to a hearing before a special inquiry officer on his claim of physical persecution, and in any event this decision which was not appealed was *res judicata* in the subsequent injunctive action as was so held by Judge Kilkenny (see statement *supra*).

B. Appellant is not entitled to a hearing before a special inquiry officer simply because his ship is no longer in port.

In his brief, appellant argues (BR. 10-13) that he is entitled to reopen this case and to a hearing before a special inquiry officer on the ground that his ship has long since departed this country and that the need for summary deportation no longer exists. To suport his position, appellant quotes (BR. 12) from the treatise on "Immigration law and Procedure" by Gordon and Rosenfield to the effect that a crewman "whose vessel has left" should be expelled in accordance with normal deportation procedures including a hearing before a special in-

quiry officer. Whether or not this treatise correctly states the law, the Section quoted is clearly inapplicable on its face because it expressly applies to "crewmen whose vessel has left." In the present case, appellant's landing permit was revoked while his ship was in port. Similarly, appellant's reliance (BR. 13) upon *Matter of M,* 5 I and N, DEC 127 1953) is misplaced because in that case the crewman's ship had already left the port before he was taken into custody. It is irrelevant that, because of the delay caused by appellant's various legal maneuvers, his ship subsequently left the port. A contrary result would vitiate the special procedures provided by Congress in Section 252(b), 8 U.S.C. 1282(b). Otherwise a crewman could delay his departure until his ship had left by habeas corpus or other legal action and then be rewarded for his procrastination with a hearing generally reserved for aliens other than crewmen under Section 242(b), 8 U.S.C. 1252(b).

C. Appellant is not entitled to reopen the case on his claim of alleged persecution on account of religion and political opinion

Appellant is not entitled to reopen the case, as he claims (BR. 8-10), on the basis of the 1965 amendment (made a few months after Judge East's decision) to Section 243(h) which permits a stay of deportation to an alien within the United States who—in

the opinion of the Attorney General—would be subject to persecution on account of race, religion or political opinion. As was held by Judge East below and in *Glavic* v. *Beechie, supra,* appellant is not eligible for this form of discretionary relief which applies to deportation proceedings for aliens generally under Section 242(b), 8 U.S.C. 1252(b).

Again, no appeal was taken from this decision and the matter was properly considered to be *res judicata* by Judge Kilkenny.

In any event, as pointed out in the *Glavic* case, *supra* (225 F.Supp. at p. 24) the amendment in question merely changed the statute to a form identical to Regulation 8 C.F.R. 253.1(e), namely "persecution on . . . account of race, religion, or political opinion." Consequently, the Supreme Court's opinion in *Soric* v. *INS,* 384 U.S. 285, cited in appellant's brief at page 9, is inapplicable to this appeal since that case involved an application under 8 U.S.C. 1253(h) which had been denied before the statute was amended, in contrast to the present case which pertains to an application by an alien crewman properly heard under 8 C.F.R. 253.1(e).

Moreover, the thorough January 25, 1965, opinion of District Director Urbano expressly discussed and rejected each of the criteria of race, religion, or political opinion, and held that appellant would not

be subjected to such persecution—except the appropriate punishment which might be imposed for his wilful failure to leave with his ship. (R. 107-110). In reviewing this decision, Judge East noted the "complete absence" of evidence substantiating appellant's claim of persecution for his political beliefs (R. 94). Although Urbano's findings, and the decision of Judge East refer primarily to "physical" persecution, appellant has failed to show either in the proceedings below or here how he would meet the test of "persecution" generally. Significantly, appellant's application for parole filed by him after the amendment to 8 U.S.C. 1253(h) and after his private bill for relief had been turned down by the Senate Judiciary Committee, referred only to the prior record before Judge East in claiming that he would be subject to anticipated persecution on account of religion or political opinion (R. 34). Neither Urbano, in his decision of June 23, 1966, denying this application for parole (R. 32), nor Judge Kilkenny in his decision rejecting the claim for injunctive relief (R. 20), was persuaded that appellant was entitled to reopen the case on the basis of the record in the prior case. Indeed, the only specific matter raised by appellant on his claim of "persecution" is his assertion (BR. 13) that both Urbano and the Courts below failed to consider "the prospect of harassment and prolonged imprisonment for violated exit restrictions as a factor to be considered under 'persecution' ". We submit that to the con-

trary, this matter was specifically considered by Urbano in his decision of January 25, 1965, which was carefully reviewed by Judge East. In this decision Urbano expressly referred (R. 108) to the case of *Sovich* v. *Esperdy*, 319 F.2d 21 (C.A. 2), cited by appellant (BR. 13), to the effect that an alien threatened with long years of imprisonment, perhaps even life sentence, for attempting to escape a Communist dictatorship would be entitled to asylum on the ground of physical persecution. Obviously, Urbano found that such a claim in this case was without foundation when he noted that appellant would probably be confined for a brief period by Yugoslav authorities for investigation of his desertion of the ship but that he would not be subjected to a long jail sentence or suffer the "dire punishment he recounts." (R. 108-109). This finding of Urbano was not questioned and was upheld by Judge East and appellant—aside from the fact that the matter is *res judicata* — clearly has no cause to complain on the merits.

D. Appellant is not entitled to a Voluntary Departure.

Appellant claims (BR. 16) that, in the event his claim to further relief is denied, that he be granted the opportunity under 8 U.S.C. 1254(e) "to depart voluntarily from the United States at his own expense in lieu of deportation". Appellant's argument in this regard is again based—we respectfully sub-

mit—on a confusion of the distinction between the ordinary deportation proceedings under 8 U.S.C. 1252-1254 and the present exclusion proceeding under the alien crewmen provisions of 8 U.S.C. 1281-1282. The two cases cited by appellant in his brief (BR. 16) in support of his argument are not in point since both decisions dealt with the privilege of voluntary departure provided by Section 244 (e) 8 U.S.C. 1254(e). This privilege is limited by its terms to "an alien under deportation proceedings" pursuant to 8 U.S.C. 1252, *et seq.* and has no application to the instant case which falls squarely within the alien crewmen provision of 8 U.S.C. § 1282(b). As previously related, this section provides for deportation of the alien crewman by returning him to the vessel or transportation line which brought him to the United States, and expressly states that the general deportation statute (8 U.S.C. 1252) has no application to this type of case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgement below should be affirmed.

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NORMAN SEPENUK
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: : day of January 1967.